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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. FROLIAN AGUILAR, Defendant and Appellant.	B286770 (Los Angeles County Super. Ct. No. PA030303)

APPEAL from postjudgment orders of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Kieran D. C. Manjarrez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Frolian Aguilar appeals from the denial of his petitions for recall of sentence pursuant to Proposition 36 (Pen. Code[1], § 1170.126) and Proposition 47 (§ 1170.18). We affirm.

II. BACKGROUND

On August 28, 1998, defendant pleaded no contest to one count of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), specifically, rock cocaine, and admitted two prior strike allegations (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), for second degree robbery (§ 211). During the prior robberies, defendant had pointed a firearm at one of his victims. Defendant was sentenced to 25 years to life in state prison.

In prison, defendant sustained a number of rules violations. On October 13, 2001, correctional officers heard slapping sounds and loud screaming coming from defendant's cell. They went to the cell and found defendant punching his cellmate in the head and face. After breaking up the fight, they found, among defendant's personal property, a 6 1/8 inches-long inmate-manufactured weapon that could be used for stabbing. Defendant denied that the weapon belonged to him. The Department of Corrections and Rehabilitation (the Department) sustained a finding that defendant had battered an inmate and had possessed a deadly weapon.

On August 7, 2002, a correctional officer heard a metal grinding noise coming from defendant's cell. Defendant was

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[1] Further statutory references are to the Penal Code unless otherwise indicated.

leaning over a cardboard box and moving his hand back and forth along his cell floor. The officer observed defendant try to conceal something in his left hand, and then heard a metal object fall on the floor as defendant turned. The officer demanded that defendant show him the item. Defendant grabbed a tennis shoe, pulled out the sole of the shoe, and showed the officer an object before flushing the object down the toilet. The officer described the object as being four inches long, with a sharpened point. Defendant contended that the object was a straightened-out paperclip, which he had used to cut his shower shoes. At the conclusion of the hearing process, defendant was found to have possessed dangerous contraband.

On August 11, 2004, defendant yelled to a corrections officer that he had a weapon and was going to use it to "stick" another inmate, because that inmate had tried to "stick" him. At the time, defendant was holding a weapon. Defendant and the other inmate did not initially follow instructions to lie on the floor and both had to be sprayed in the face. The officer later found an inmate-manufactured weapon that was 3 1/2 inches long, with a sharpened point. The Department sustained a finding that defendant possessed a deadly weapon.

On December 15, 2006, after he was escorted to his cell and had his handcuffs removed, defendant rushed to the back of the cell and began punching his cellmate. Defendant refused orders to stop striking his cellmate until correctional officers used pepper spray on him. The Department concluded defendant had battered an inmate.

Defendant also had been disciplined for: refusing to go to work (October 23, 1999); possessing inmate-manufactured alcohol (July 3, 2000; July 9, 2000; August 30, 2001; October 5, 2001;

June 17, 2002; July 11, 2002); engaging in mutual combat (August 23, 2000); cadence calling (November 29, 2000; December 2, 2000); delaying a police officer (December 16, 2000); refusing a direct order (January 21, 2001); and disobeying a direct order (December 17, 2003).

On March 1, 2013, defendant filed a petition under section 1170.126 to recall his sentence (Proposition 36 petition) and impose a determinate "second strike" sentence of six years in state prison. Defendant contended, and it is not disputed, that his current conviction was not a disqualifying conviction for recall of his sentence. Defendant further asserted he did not pose an unreasonable risk of danger to public safety. The Los Angeles County District Attorney opposed the petition, arguing that based on his post-conviction conduct, defendant was not suitable for relief.

On March 19, 2015, prior to resolution of the Proposition 36 petition, defendant filed a petition to recall his sentence pursuant to section 1170.18 (Proposition 47 petition), and to reduce his felony conviction for possession of a controlled substance to a misdemeanor. Defendant contended that in 2006, he disassociated with his prison gang and had not committed any rules violations since that time. He argued that if he were released, he would be removed to Mexico, where he would be supported by his family and therefore would not return to a life of crime. The District Attorney opposed the petition.

On April 18, 2017, the trial court heard argument on the Proposition 47 petition, finding that defendant's "gang participation, institutional behavior, and insufficient rehabilitative programming . . . remains probative of his current risk of danger to public safety." The trial court further found that

defendant had indicated "a willingness to engage in future super-strike behavior."

On October 24, 2017, the trial court heard defendant's Proposition 36 petition. On November 8, 2017, the trial court denied that petition, citing the same evidence presented against defendant's Proposition 47 petition.

III. DISCUSSION

A. *Proposition 36*

1. The Act

The Three Strikes Reform Act of 2012 (Proposition 36) "amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second[-]strike sentence of twice the term otherwise provided for the current felony. . . . [¶] . . . [¶] In addition to reducing the sentence to be imposed for some third[-]strike felonies that are neither violent nor serious, [Proposition 36] provides a procedure by which some prisoners already serving third[-]strike sentences may seek resentencing in accordance with the new sentencing rules. (§ 1170.126.) . . . In contrast to the rules that apply to sentencing, . . . the rules governing resentencing provide that an inmate will be denied recall of his or her sentence if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).)" (*People v. Johnson* (2015) 61 Cal.4th 674, 681-682.)

Factors a trial court may consider in exercising its discretion under subdivision (f) of section 1170.126 include: defendant's criminal conviction history, defendant's disciplinary record and record of rehabilitation while incarcerated, and any other evidence that the trial court determines is relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.126, subd. (g).)

2. Proposition 36 is not Unconstitutionally Vague

Defendant argues Proposition 36 is unconstitutionally vague. "'The vagueness doctrine bars enforcement of "'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' [Citation.]"'" (*People v. Navarro* (2016) 244 Cal.App.4th 1294, 1300.) We review vagueness challenges de novo. (*Id.* at p. 1301.)

"Following the enactment of Proposition 36, Courts of Appeal have rejected arguments that the phrase 'unreasonable risk of danger to public safety,' as used in section 1170.126, subdivision (f), is unconstitutionally vague. (See, e.g., *People v. Garcia* (2014) 230 Cal.App.4th 763, 769-770 . . . ; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075 . . . ['Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety'].)" (*People v. Valencia* (2017) 3 Cal.5th 347, 354-355.) Defendant nonetheless contends that "risk of danger" in section 1170.126, subdivision (f) is a vague and ambiguous pleonasm,

which refers to a redundancy. (See *Wilson v. Gentile* (1992) 8 Cal.App.4th 759, 764.) According to defendant, "The destructive force of pleonasm[] lies in the fact that by modifying a word with the very essential meaning of that word, the pleonasm negates the true and correct meaning of the word." We conclude that Proposition 36 is not unconstitutionally vague as a pleonasm. First, although "risk" and "danger" describe closely related concepts, they are not redundant: "risk" is defined as "possibility of loss or injury," (Merriam-Webster's Collegiate Dict. (10th ed. 1993) p. 1011), while "danger" is defined as "exposure or liability to injury, pain, harm, or loss." (*Id.* at p. 292.) Second, even if risk and danger were redundant in the abstract, as used in section 1170.126, those terms are not vague. (See *People v. Navarro, supra*, 244 Cal.App.4th at pp. 1300-1301 [""abstract legal commands must be applied in a specific *context*""].) Proposition 36 directs the trial court to consider whether granting defendant's petition will pose an "unreasonable risk of danger *to public safety*." Thus, a trial court may deny a defendant's recall of sentence petition based on its conclusion that defendant poses an unreasonable chance of exposing the public safety to harm.

Next, citing *Sessions v. Dimaya* (2018) 576 U.S. ___ [138 S.Ct. 1204] (*Dimaya*), defendant contends section 1170.126, subdivision (f) is a vague residual clause because it allows the trial court to deny a Proposition 36 petition based on a subjective and vague risk. We disagree. In *Dimaya*, the United States Supreme Court considered title 18 United States Code section 16(b) (section 16(b)), which defined a "crime of violence" for purposes of an "aggravated felony" under the Immigration and Nationality Act to include "any other offense that is a felony and

that, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." (*Dimaya, supra*, 576 U.S. at p. ___ [138 S.Ct. at p. 1211], italics added.)

The United States Supreme Court, citing *Johnson v. United States* (2015) 576 U.S. ___ [135 S.Ct. 2551], explained the due process concerns posed by section 16(b): "[Section] 16(b) . . . 'requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk. [Citation.] The result is that [section] 16(b) produces . . . 'more unpredictability and arbitrariness than the Due Process Clause tolerates.'" (*Dimaya, supra*, 576 U.S. at p. ___ [138 S.Ct. at p. 1216].)

Proposition 36, however, includes no such similar reference to an offense's "nature," that is, it does not require the trial court to abstractly consider an "ordinary case" in order to determine whether releasing an inmate poses a sufficient level of risk. Further, the United States Supreme Court in *Dimaya* anticipated and rejected defendant's vagueness argument here: "'[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree[.]'" (*Dimaya, supra*, 576 U.S. at p. ___ [138 S.Ct. at p. 1214].) Here, the trial court determined that defendant posed an "unreasonable risk of danger to public safety" based on the real-world conduct of his prior criminal offenses and prison disciplinary record, as it was permitted to do. (§ 1170.126, subds. (f) and (g).) We do not find section 1170.126, subdivision (f) to be unconstitutionally vague.

3. Trial Court Did Not Abuse Its Discretion in Denying Defendant's Proposition 36 Petition

Defendant also contends the trial court abused its discretion in denying his Proposition 36 petition. We review a trial court's exercise of discretion under section 1170.126, subdivisions (f) and (g) for an abuse of discretion. (*People v. Valencia, supra*, 3 Cal.5th at p. 354; *People v. Buford* (2016) 4 Cal.App.5th 886, 894-895.) A trial court abuses its discretion when the "ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts . . . ." (*People v. Williams* (1998) 17 Cal.4th 148, 162.) Defendant contends the trial court abused its discretion here because the evidence was speculative that he would reoffend if released. We find no abuse of discretion.

The trial court considered defendant's criminal history, commitment offense, prison disciplinary record, lack of rehabilitative programming, gang activity, and the weaknesses of his post-release plans in reaching its conclusion that defendant posed an unreasonable risk of danger to public safety. Defendant was cited for multiple rules violations while incarcerated, including for violent offenses. Moreover, defendant's current commitment offense is possession of a controlled substance, and while incarcerated, defendant had been found in possession of inmate-manufactured alcohol on six occasions. The trial court found "scant evidence" that defendant had participated in rehabilitation programs. Finally, the trial court found defendant's post-release plans, to live a law-abiding life in Mexico, unpersuasive. Defendant had re-entered the country illegally after his first removal, and was then arrested for his

current offense. Thus, the trial court concluded defendant had not provided a satisfactory plan that would reduce his risk of danger to public safety. Given this evidence in the record, the trial court could conclude there was an unreasonable risk of danger to public safety if defendant was resentenced under section 1170.126. We do not find the trial court's ruling to fall outside the bounds of reason.

B. *Proposition 47 Petition*

Defendant also contends the trial court erred by denying his Proposition 47 petition. "Approved by the voters in 2014, Proposition 47 (the 'Safe Neighborhoods and Schools Act') reduced the punishment for certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies." (*People v. Page* (2017) 3 Cal.5th 1175, 1179.) "Under section 1170.18, subdivision (a), a person who is currently serving a sentence for a felony conviction that would have been a misdemeanor under the Act may petition the court that entered the judgment of conviction to recall the person's felony sentence and resentence the person as if he or she had been convicted of the misdemeanor. If the court determines that the defendant satisfies the criteria of section 1170.18, subdivision (a), the court is required to recall the felony sentence and resentence the defendant to the misdemeanor sentence, 'unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)" (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 239-240.)

Proposition 47's definition of "unreasonable risk of danger to public safety" is more limited than the definition provided by Proposition 36; namely, it refers to a danger that defendant will commit a "super-strike." (*People v. Valencia, supra,* 3 Cal.5th at pp. 355-356; § 1170.18, subd. (c).) A "super-strike" includes: a sexually violent offense (Welf. & Inst. Code, § 6600, subd. (b)), oral copulation with a child under 14 years of age (§ 288a), sodomy with another person under 14 years of age (§ 286), sexual penetration with another person under 14 years of age (§ 289), lewd or lascivious act involving a child under 14 years of age (§ 288), any homicide or attempted homicide (§§ 187-191.5), solicitation to commit murder (§ 653f), assault with a machine gun on a peace officer or firefighter (§ 245, subd. (d)(3)), possession of a weapon of mass destruction (§ 11418, subd. (a)(1)), and any serious or violent felony punishable in California by life imprisonment or death. (§ 667, subd. (e)(2)(C)(iv).)

We review the trial court's exercise of its discretion pursuant to section 1170.18, subdivision (c) for an abuse of discretion. (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1264; accord, *People v. Jefferson, supra*, 1 Cal.App.5th at pp. 242-243.) "The typical abuse of discretion standard involves an analysis of whether the trial court's decision is supported by "'substantial evidence,'" and 'has been characterized as a "deferential" standard.' [Citation.] 'A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question. Once such evidence is

found, the substantial evidence test is satisfied." (*People v. Fuiava* (2012) 53 Cal.4th 622, 711.)[2]

On this record, we do not find an abuse of discretion. Like section 1170.126, section 1170.18 permits a trial court to consider a petitioner's criminal conviction history, prison disciplinary record and record of rehabilitation, and other evidence deemed relevant by the trial court to decide whether there would be an unreasonable risk of the defendant committing a super-strike if resentenced. (§ 1170.18, subds. (b), (c).) While defendant has not been convicted of or otherwise accused of committing a super-strike offense, the court could fairly consider his criminal history and record of prison discipline to conclude that he posed an unreasonable risk of committing murder or attempted murder. Indeed, defendant had pointed a firearm at a victim while committing robbery; and while in prison, possessed dangerous or deadly contraband or weapons on three occasions and twice battered an inmate. He expressed a willingness to inflict a deadly wound when he stated that he intended to use a weapon to "stick" another inmate. Defendant's prior use of a firearm and use of weapons while in prison support a conclusion that defendant posed an unreasonable risk of committing a "super-strike" if released. (See *People v. Jefferson, supra,* 1 Cal.App.5th

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[2] Defendant argues the trial court misapplied its discretion under Proposition 47, citing the trial court's conclusion that defendant's release "'would pose an unreasonable risk of danger to public safety,'" as opposed to an unreasonable risk of danger that he would commit a super-strike. In the same order, the trial court repeatedly made clear that "'unreasonable risk of danger to public safety'" in the context of Proposition 47 referred to the risk that he would commit a super-strike. We accordingly find no error on this ground.

at p. 245 [defendant's personal use of a firearm and personal infliction of great bodily injury on victim, plus gang ties, demonstrated that defendant was likely to commit super-strike]; *People v. Hall, supra,* 247 Cal.App.4th at p. 1264-1265 [where a defendant expressed a willingness to use not only force but deadly force, the trial court appropriately denied petition].)

We note the trial court found that membership in a prison or street gang necessarily meant that defendant was involved in the commission or attempted commission of at least some super-strikes. Moreover, the trial court, in its written order, incorrectly stated that defendant had been a verified member of a gang until 2011, when the record reflects that defendant was a verified member until 2006.[3] It would have been improper for the trial court to rely solely on defendant's gang membership to deny defendant's petition, as the voters who approved Proposition 47 were specifically informed that criminal street gang members would be entitled to recall of sentence if the defendant had a qualifying conviction and there was not an unreasonable risk that the defendant would commit a super-strike if resentenced. (*People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1310-1311.) But as discussed above, the trial court did not rely on this factor alone in denying defendant's petition. Rather, the record includes substantial other evidence upon which the trial court reasonably relied in denying defendant's petition. (*People v. Fuiava*, *supra,* 53 Cal.4th at p. 711.)

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[3] Indeed, during the hearing on defendant's Proposition 47 petition, the trial court accepted that defendant had not been involved in any gang activity since 2006, but noted that it was easier for defendant to stay out of trouble beginning in 2006 because he had a single cell.

Defendant next argues that because defendant would be removed to Mexico, he would not pose an unreasonable risk of danger to public safety, which he contends refers to the safety of the California public. According to defendant, the trial court thus erred in denying his petition. Defendant's argument is unavailing. As noted by the trial court, defendant returned to California after his first removal, and the trial court discredited his post-release rehabilitative plans. The trial court was entitled to and did express skepticism about defendant's post-release plans.

Finally, defendant had no record of prison discipline since 2006; but that does not necessarily mean the trial court abused its discretion by denying the petition based on defendant's prior conduct. (See *People v. Hall, supra*, 247 Cal.App.4th at pp. 1265-1266 [affirming trial court's exercise of discretion in denying section 1170.18 petition based on defendant's criminal conviction history, including threats to kill the victim during a robbery while on probation, even though defendant had no record of prison misconduct].) Reasonable minds can differ without a finding of an abuse of discretion. (See *People v. Moya* (1986) 184 Cal.App.3d 1307, 1313, fn. 2 ["[a] record presenting facts on which reasonable minds may differ is not a record establishing an abuse of discretion"].) We do not find on this record that the trial court abused its discretion in denying defendant's Proposition 47 petition.

IV. DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

BAKER, Acting P.J.

SEIGLE, J. *

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.